

Trial Testimony Designations for:
United States v. W. R. Grace & Co., et al. (U.S. Dist. Ct., Dist. of Montana,
Missoula Division, Case No. CR 05-07-M-DWM)
February 23, 2009
Afternoon Session

Deposition Designation Key

Arrowood = Arrowood Indem. Co.
f/k/a Royal Indem. Co. (Light Green)

BNSF = BNSF Railway Co. (Pink)

Certain Plan Objectors "CPO" = Government Employees Insurance Co.; Republic Insurance Co. n/k/a Starr Indemnity and Liability Co.; OneBeacon America Insurance Co.; Seaton Insurance Co.; Fireman's Fund Insurance Co.; Allianz S.p.A. f/k/a Riunione Adriatica Di Sicurtà; and Allianz SE f/k/a Allianz Aktiengesellschaft; Maryland Casualty Co.; Zurich Insurance Co.; and Zurich International (Bermuda) Ltd.; Continental Casualty Co. and Continental Insurance Co. and related subsidiaries and affiliates; Federal Insurance Co.; and AXA Belgium as successor to Royal Belge SA (Orange)

CNA = Continental Cas. Co & Continental Ins. Co. (Red)

FFIC = Fireman Funds Ins. Co. (Green)
FFIC SC = Fireman Funds Ins. Co. "Surety Claims" (Green)

GR = Government Employees Ins. Co.; Republic Ins. Co. n/k/a Starr Indemnity and Liability Co.

Libby = Libby Claimants (Black)

OBS = OneBeacon America Ins. Co. and Seaton Ins. Co. (Brown)

PP = Plan Proponents (Blue)

Montana = State of Montana (Magenta)

Travelers = Travelers Cas. and Surety Cos. (Purple)

UCC & BLG = Unsecured Creditors' Committee & Bank Lenders Group (Lavender)

AFNE = Assume Fact Not in Evidence	L = Leading
AO = Attorney Objection	LA = Legal Argument
BE = Best Evidence	LC = Legal Conclusion
Cum. = Cumulative	LPK = Lacks Personal Knowledge
Ctr = Counter Designation	LO = Seeking Legal Opinion
Ctr-Ctr = Counter-Counter	NT = Not Testimony
ET = Expert Testimony	Obj: = Objection
F = Foundation	R = Relevance
408 = Violation of FRE 408	S = Speculative
H = Hearsay	UP = Unfairly Prejudicial under Rule 403
IH = Incomplete Hypothetical	V = Vague

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO.

CR 05-07-M-DWM

W.R. GRACE & COMPANY, HENRY A.
ESCHENBACH, JACK W. WOLTER,
WILLIAM J. McCAIG, ROBERT J.
BETTACCHI, and ROBERT C. WALSH,

Missoula, Montana
2.23.09
1:00 p.m.

Defendants.

JURY TRIAL - VOLUME 1 - AFTERNOON SESSION
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD W. MOLLOY,
UNITED STATES DISTRICT JUDGE, and a jury.

Proceedings recorded by mechanical stenography and
transcript produced by computer by
Julie M. Lake, RDR, RMR, CCR,
Martin-Lake & Associates, Inc.

Libby

PP Obj:
F; R

1 period of time after which the mine had been shut down,
2 commencing with the reclamation process and the conveyance of
3 these properties.

4 And then finally the conspiracy to defraud does go
5 back during an earlier period of time, but now a conspiracy to
6 defraud is not endangerment. The claim is not that there was a
7 conspiracy to endanger back in the '70s and '80s, but rather a
8 conspiracy to defraud back in the '80s.

9 So as the Court has indicated, these are very, very
10 specific claims, very, very specific charges that are being
11 made and you have to keep your eye on the ball of those
12 charges.

13 Now, what I'm going to try to do for this afternoon
14 and spend most of my time on is talking about what the evidence
15 will show. Because together with these very specific claims
16 you have to deal with all the evidence in the case.

17 But I want to come back and say that given these
18 claims there is one charge that is not being made here even by
19 the Government. There is no charge in this case that the
20 Defendants, either Grace or the individuals, acted criminally
21 to cause injury to the miners and their families. There is not
22 that charge in this case. And I say that without
23 saying--trying to say, well, let's just kind of gloss all over
24 that. There is no question that the miners and their families
25 suffered tragic losses as a consequence of the operation of

Libby

PP Obj:
F;R

1 this mine. There is no question about that. And the fact of
2 that injury and that toll casts a dark shadow over Grace, over
3 Libby and over this courtroom. And I'm not denying that.
4 Nobody can deny that.

5 But this case requires that you, in satisfaction of
6 your oath, focus on what is it that counts on the charges that
7 actually are being made, and there is no such charge in this
8 case.

9 So what is the story then? What is the evidence?
10 What will the evidence show? To lay out the evidence I'm going
11 to talk about one common story that carries throughout this
12 case from beginning to end, and I'm going to come back to the
13 charges in order to help organize some of those facts towards
14 the very end, God willing, if I have enough time. But the most
15 important thing that I want to accomplish is to talk about the
16 story, the basic story line, so that you can hear it all in one
17 sequence and start to think about that story.

18 In service of that, T.J., if you can help out with
19 this board here. I'm going to walk through one sequence of
20 history and try to lay that story out for you.

21 So, where do we begin? We begin in 1976. Because
22 in 1976 is the point in time at which the criminal charges in
23 this case begin. 1976.

24 Now, we could just start there; that's where the
25 conspiracy is charged to have begun, but we're going to go back

1 to offer evidence that says that the people of the Libby
2 community are now getting sick with asbestos-related disease at
3 an alarming rate. And even this week you are going to hear
4 testimony from witnesses who will talk about the fact that they
5 have lived in Libby and that they are getting sick. Witness
6 after witness after witness. And the effect of that, of seeing
7 all those witnesses line up, will obviously be to invoke the
8 pall. Obviously to invoke the question of people getting hurt.
9 Will it really be relevant to any of these different theories,
10 any of these different charges? You will have to decide that.
11 But you are going to hear about it. You are going to hear from
12 Dr. Whitehouse who has diagnosed almost all of these different
13 people. He's a local doctor in the area who has basically
14 diagnosed hundreds of people, and he's going to come in here
15 and testify.

16 So it is the position of Grace in this case that the
17 existence of disease claims and charges in Libby with respect
18 to these people in the community is not part of the charges
19 here. We don't believe it's relevant, but we also do not
20 believe that it's true.

21 I want to take you through a couple concepts to
22 leave in your mind as you think about the evidence that you
23 hear from the stand, because science has a way of clarifying
24 and deemotionalizing these very important claims that are being
25 made. They cannot be decided on the basis of emotion. They

PP
Ctr.

1 have to be decided on the basis of science. And you will have
2 the opportunity to see this science, and what you will see, you
3 will see that there is this concept called latency. Remember
4 how I said you have the workers that are exposed back here long
5 ago who are now getting sick today? That is the concept of
6 latency. It says that the exposure is long before the actual
7 diagnosis. You know that that's so, it's been demonstrated by
8 science with respect to asbestos. It is the heart of asbestos
9 science. Latency, latency, latency.

10 We have an illustration of that in the case of Libby
11 with the workers. The workers are the ones who have been
12 exposed the most. And the mortality studies that you have
13 heard about are studies that deal with the workers. And, in
14 fact, they had high exposure, there was a latency period, and
15 now, over time, the disease has risen. And that disease
16 includes lung cancer, mesothelioma, asbestosis and diffuse
17 pleural thickening. This is the arc type of latency: High
18 exposure, a lag, later disease. Later disease isn't caused by
19 something in the '60s or '70s. It's caused by something--or
20 the '70s, '80s. It's caused by exposures that took place long
21 ago. It will start in the '60s, probably tracing back to
22 exposure in the '40s and so on and so forth.

23 So now the question becomes, okay, what about
24 community disease? The first thing that you know is if people
25 are getting sick today, it's not because of a condition today

PP
Chr.

PP
Ctr.

1 or for that matter recently. Now, there may be an individual
2 who says that. There may be some evidence in some cases, but
3 by and large the curve should be--the curve today like this,
4 you should be looking for exposure like this back in a long
5 period of time ago and at very high concentrations.

6 So what do we see? First of all, science says
7 precisely that. Then you have to ask, is there some other
8 explanation for the fact that nonworkers could be getting sick?
9 The first one that's very well documented is family illness
10 often is associated with occupational exposures because of
11 take-home dust. People did take home dust. Take-home dust is
12 not the endangerment in this case. It's not the conspiracy to
13 endanger in this case. It's known as one of those things that
14 we would say doesn't fit with this case at all but we'll
15 discuss it.

16 But, in fact, we do know that workers used to bring
17 home asbestos dust on their clothes. As a consequence, their
18 families were exposed and there is family illness. That
19 illness is not from dust in the town. It's not from the kind
20 of endangerment, ambient air that's being discussed in this
21 case. It's from an occupational exposure in the home
22 associated with the job.

23 Another potential dynamic is you have people who
24 get, in Libby, asbestos-related disease but is not related to
25 the mine. It's related to the fact that they used to work in

1 another occupation or another job where they were exposed to
2 asbestos. Asbestos has been pervasive all over the country.
3 Lots and lots of people have been hurt by asbestos completely
4 independently of the Libby mine.

5 So when somebody comes in today and presents with
6 something that amounts to evidence of exposure, and you'll hear
7 all about what's disease, what's not disease, you'll hear about
8 pleural plaques. Again, one of the explanations is potential
9 exposure at nonLibby occupational environments.

10 Well, is there any disease at Libby that is caused
11 solely by exposure to ambient air, which is the heart of the
12 endangerment claim, that is unrelated to the mine, unrelated to
13 worker take-home dust, unrelated to other exposure, is just a
14 consequence of being in the Libby community?

15 Well, science would tell you two things: One, that
16 if that's true, if there is such disease today, there must have
17 been a high exposure event long ago. In other words, there
18 must be evidence that people in the town were exposed long ago
19 to very, very high exposures. There may be some people who fit
20 this bill going back to the '40s and '50s, we don't believe
21 there are very many at all, and they go back to this very, very
22 long ago period of time. They are not people who are exposed
23 at all, they are not people who have gotten sick at all as a
24 consequence of any of the charges that have been made in this
25 case, but there may be some. We think probably a very, very

PP
Ctr.

PP
Ctr.

1 few. Certainly not the hundreds that you are going to hear
2 about.

3 The other thing that you would expect from the
4 science if there were true community disease caused by the air
5 at Libby, the endangerment air, is that they would emerge in a
6 study. That is, studies have been done to see--you are always
7 going to get a certain level of disease, including diseases
8 that are similar to or in some cases actually overlap with
9 asbestos- related disease, such as lung cancer being caused by
10 smoking. So the way to tease out whether there is an excess of
11 disease is to do these mortality studies.

12 Well, there has been science mortality studies
13 regarding Libby to see is there an excess of disease at Libby.
14 And counsel quoted from that study this morning and told you
15 about 40 to 80 times or something percent or whatever excess
16 mortality at Libby. That's what he told you. In fact, there
17 was a mortality study in very recent times that asks exactly
18 that question.

19 What he didn't tell you when he quoted that study
20 was that the study actually distinguishes disease at Libby
21 associated with the mine from disease at Libby that is not
22 associated at the mine. It's more community disease. And if
23 you take the disease at Libby and that mortality study that's
24 associated with the mine out, what you find is that there is no
25 statistically increased incidence of mortality associated with

1 being in Libby. The study that counsel quoted this morning
2 needs to be read very, very carefully.

3 Are there other explanations for the fact that a lot
4 of people have come actually more or less since the EPA came
5 into town in 1999? Are there alternative explanations for how
6 all these hundreds of people can now be being diagnosed? And
7 there are a lot of other explanations. There are very, very
8 logical explanations completely consistent with the scientific
9 work that I just cited to you.

10 So I would ask you when it comes to this idea and
11 when you hear all these different people testify and you hear
12 from Dr. Whitehouse, this is an area of science. I would ask
13 you to keep an open mind and listen to the science. It's going
14 to be very easy to be affected by the pall of mortality at
15 Libby, but that pall doesn't answer your questions in this
16 case, we believe. So we would ask you to keep an open mind and
17 listen to the science.

18 On that note, I would say I'd urge you on behalf of
19 Grace, keep your eye on the ball. What's this case all about?
20 I think you now begin to appreciate it's a difficult case in
21 which to do that.

22 I agree with Mr. McLean; look at what did Grace know
23 and when did they know it? Likewise with the individual
24 Defendants, what did the individual Defendants know and when
25 did they know it? Why is that important? It's important

PP
Ctr.